92-790

reme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1992

Pauline Schoch

Petitioner,

v.

Commonwealth of Pennsylvania

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Township Ordinance proscribing criminal penalties for violations constituting a nuisance unconstitutional, as violative of the Fourteenth Amendment to the United States Constitution, when the Ordinance fails to unambiguously identify the conduct constituting a nuisance and an Intermediate State Appellate Court retroactively applied an expanded definition of what constituted a violation in contravention of the state's highest Court's definition?

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

The Parties in this Court are as follows:

Petitioner: Pauline Schoch

Respondent: Commonwealth of Pennsylvania[1]

In the Court from whose judgment review is sought, Petitioner was Appellant and Respondent was Appellee.

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[1] The original proceeding in the Lower Court was captioned as Commonwealth of Pennsylvania v. Pauline Schoch due to the criminal nature of the penalties proscribed by a violation of Penn Forest Township Ordinance No. #88-4. Therefore, the party in interest is Penn Forest Township, Carbon County, Pennsylvania.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING and RULE 29.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
FEDERAL STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
1. The Pennsylvania Commonwealth Court retroactively applied a broadened definition of what constitutes an actual nuisance bringing Petitioner's conduct within the definition and therefore giving Petitioner no warning her actions were proscribed	5
2. The definition of a nuisance in fact enunciated by the Commonwealth Court of Pennsylvania in Teal is so vague and subjective as to encourage arbitrary and erratic arrests and convictions and is, therefore, violative of the Fourteenth Amendment to the United States Constitution	8
CONCLUSION	9
APPENDIX	ia

TABLE OF AUTHORITIES

Cases	Pages
Commonwealth v. Hanzlik, 400 Pa. 134, 161 A.2d. 340 (1960)	5,6,7,8
Teal v. Haverford Township, 134 Pa. Cmwlth. 157, 578 A.2d. 80 (1990), Petition for Allowance of Appeal Denied 527 Pa. 659, 593 A.2d. 429 (1991)	5,6,7,8
Colautti v. Franklin, 439 U.S. 378, 99 S. Ct. 675, 58 L. Ed. 2nd. 596 (1979)	6
Osborne v. Ohio, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2nd. 98 (1990)	6,7
Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2nd. 894 (1964)	7
Rabe v. Washington, 405 U.S. 313, 92 S. Ct. 993, 31 L. Ed. 2nd. 258 (1972)	7
Marks v. United States, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2nd. 260 (1977)	7
Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2nd. 469	8
CONSTITUTIONAL PROVISION	
Fourteenth Amendment to the United States Constitution, Section 1	1d

No. _____

IN THE

Supreme Court of the United States

October Term, 1992

Pauline Schoch

Petitioner,

v.

Commonwealth of Pennsylvania

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioner, Pauline Schoch, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania entered in this case on November 19, 1991.

OPINIONS BELOW

The memorandum opinion of the Commonwealth Court of Pennsylvania in Pauline Schoch v. Commonwealth of Pennsylvania is reprinted in the Appendix to this Petition ("App.") p. 1a. The opinion of the Court of Common Pleas of Carbon County in Commonwealth of Pennsylvania v. Pauline Schoch denying Schoch's Post-Verdict Motions for a New Trial and an Arrest of Judgment is reprinted in the Appendix to this Petition App. p. 1b.

JURISDICTION

The Order of the Commonwealth Court was entered on November 19, 1991, and a Petition for Allowance of Appeal was timely filed with the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal on August 10, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C §1257.

FEDERAL STATUTES AND RULES INVOLVED

The relevant federal statutory provision is reprinted in the Appendix. It is the Fourteenth Amendment to the Constitution of the United States, Section 1.

STATEMENT OF THE CASE

This Petition stems from the denial by the Supreme Court of Pennsylvania of Schoch's Petition for Allowance of Appeal of the decision of the Commonwealth Court of Pennsylvania which affirmed the decision of the Court of Common Pleas of Carbon County, Pennsylvania, which denied Schoch's Post-Verdict Motions for a New Trial and an Arrest of Judgment.

On May 31, 1990, Schoch was arrested and charged with a violation of Penn Forest Township Ordinance 88-4 regarding the storage of junk automobile parts. She was convicted before a District Justice and appealed to the Court of Common Pleas.

On November 27, 1990, a Summary Appeal trial was held before the Honorable William W. Lipsitt, S.J., Specially Presiding. After a brief hearing, the Court found the Defendant guilty and denied the appeal. On December 5, 1990, the Defendant timely filed Post-Verdict Motions for a New Trial and an Arrest of Judgment. On March 19, 1991, the Court of Common Pleas denied Schoch's Post-Verdict Motions for a New Trial and an Arrest of Judgment and affirmed Schoch's conviction. On April

17, 1991, Schoch filed a Notice of Appeal to the Commonwealth Court. The Commonwealth Court affirmed the Common Pleas Court decision on November 19, 1991. Schoch then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. On August 10, 1992, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal. Schoch now files this Petition for Writ of Certiorari.

Schoch has raised the Constitutional issue sought to be reviewed by this Honorable Court at every pertinent stage below. It was first raised at closing argument at the Summary Appeal Trial in the Court of Common Pleas. Subsequently, it was raised in Schoch's Post-Verdict Motions, her Commonwealth Court brief and her Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

Schoch has been charged with a violation of Penn Forest Township Ordinance 88-4, which pertains to:

> "the maintenance of property in the Township of Penn Forest requiring the cutting and removal of grass, weeds and noxious vegetation; by prohibiting and regulating nuisances generally, the maintenance of unguarded or abandoned excavation, wells, etc., keeping or storage of debris, garbage, junk, and refuse; and providing for the abatement of prohibited conditions, and proscribing penalties for violations thereof."

Nowhere in the Ordinance is the word "nuisance" defined, except that Section 3, "nuisances generally", refers to the definition as it exists in Chapter 65 of Title 18, The Crimes Code. This definition does not include junk automobiles and their parts.

Section 6 of the Ordinance states:

"Debris, Garbage, Junk and Refuse

A. Junk. No junk shall be kept or stored on any premises or property within the Township unless the

keeping or storage of the same is specifically permitted by the Zoning Ordinance."

Nowhere in Ordinance 88-4 are the conditions of a nuisance defined that must be found before there can be a violation for the storage of junk. Instead, the Ordinance merely defines junk in Section 2 as, in part, "scrapped motor vehicles and parts thereof, including motors, bodies of motor vehicles and vehicles which are inoperable, unlicensed, and do not have a current and valid inspection sticker."

During the Summary Appeal trial, the Commonwealth called only one witness, Sandra J. Funk, the Code Enforcement Officer for Penn Forest Township. Ms. Funk testified that she was actually on the Defendant's property only once, on May 8, 1990 and that she had taken pictures from the adjoining road of the property on another occasion. She further testified that any visibility of the vehicles from the adjoining road would be blocked during the non-winter months by the foliage of the trees on the property. She further testified her best guess was that the nearest vehicle was about 50 feet from the road and did not, in anyway, interfere with the traffic proceeding on the adjacent road, Maury Road or any pedestrians who may be walking on Maury Road. There was no testimony that any persons, including children, walk along Maury Road.

Nowhere in Ms. Funk's testimony did she state that she had received any complaints from anyone in the community, except that the situation had been brought to her attention by the Township Supervisors. Further, she testified that she knew of no children who played in the area around the vehicles, knew of no injuries occurring to anyone in the area, and knew of no rodents infesting the area. She testified, however, that the area around the vehicles was not fenced and that existing in the area were rusted materials and broken glass.

Testimony presented by Schoch was from Milford Schoch, her son, who testified that the vehicles and parts thereof had been

stored on his mother's property for 15-20 years, dating back to when the property was jointly owned by his mother and father. This activity of the Defendant pre-dates by at least 13 years, the effective date of the Ordinance.

Milford Schoch further testified that he makes use of the materials that he gets from the vehicles stored on his mother's property by casting aluminum and making belt buckles, which, for the most part, has been a hobby, but which has also been a source of income for him.

REASONS FOR GRANTING THE WRIT

1. The Pennsylvania Commonwealth Court retroactively applied a broadened definition of what constitutes an actual nuisance bringing Petitioner's conduct within the definition and therefore giving Petitioner no warning his actions were proscribed.

The law of Pennsylvania with regard to the prohibition of nuisances, including the storage of junk automobiles and their parts, as in the case at bar, has been long established by the Pennsylvania Supreme Court case of *Commonwealth v. Hanzlik*, 400 Pa. 134, 161 A.2d. 340 (1960).

In *Hanzlik*, the Court provides a mechanism for salvaging ordinances which merely prohibited the storage of junk automobiles and their parts by requiring proof of an actual nuisance.

The *Hanzlik* standard necessitated proof of loud noises, offensive odors, attraction to vermin, or the possibility of injury to a person from the complained of storage of the vehicles. *Hanzlik*, A. 2nd. at 341.

In the decision of *Teal v. Haverford Township*, 134 Pa. Cmwlth. 157, 163, 578 A.2d. 80, 83 (1990), Petition for Allowance of Appeal Denied 527 Pa. 659, 593 A.2d. 429 (1991).

The definition of what constituted a nuisance in fact was broadened to include danger, inconvenience or distraction. *Teal* was decided on July 23, 1990. Most importantly, the Petitioner was arrested for a violation of Penn Forest Township Ordinance 88-4 on May 31, 1990. Therefore, on May 31, 1990, the only standard of proof that could be applied to determine whether Petitioner's conduct was a nuisance in fact was the *Hanzlik* standard of loud noises, offensive odors, attraction to vermin or a possibility of injury to a person. However, as is clear from the Memorandum Opinion of Judge Collins of the Commonwealth Court of Pennsylvania, the *Teal* standard of public danger, inconvenience or distraction was applied to affirm the conviction of Petitioner (Opinion, p. 7)

Retroactive application of a broadened definition to bring within its ambit the conduct of the Petitioner is in contravention of the well established due process analysis of this Honorable Court. Statutes or Ordinances must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or it is so indefinite that it encourages arbitrary and erratic arrest and the conviction is void for vagueness. *Colautti v. Frankin*, 439 U.S. 378, 390, 99 Sup. Ct. 675, 683, 58 L. Ed. 2nd. 596, 606 (1979).

However, this Court has upheld unconstitutional statutes or ordinances as written when the state's highest court has narrowed the application of the statute to constitutionally permissible limits and that narrowing application took effect in sufficient time to give the defendant fair warning that his conduct is proscribed *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2nd. 98 (1990).

In *Osborne*, a child pornography case, this Court upheld a construction of the Ohio Supreme Court under circumstances where the construction affords fair warning to the defendant that his conduct was proscribed. *Osborne*, supra., U.S. at 116, S.Ct at 1699, L. Ed. 2nd. at 113. In *Osborne*, other cases are con-

trasted, some of which, Petitioner suggests, are directly controlling the case at bar.

For example, in *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2nd. 894 (1964), a trespassing case, the South Carolina Supreme Court expanded the definition of what constituted the crime. This Court reversed the conviction, holding the South Carolina Supreme Court's expansion of the statute was unenforceable as the Petitioner had no reason to suspect his conduct was criminal at the time it was committed *Osborne* supra., S. Ct. at 1700, U.S. at 117, L. Ed. 2nd. at 114.

In *Rabe v. Washington*, 405 U.S. 313, 92 S. Ct. 993, 31 L. Ed. 2nd. 258 (1972), an obscenity statute was broadened by the Washington Supreme Court to reach the conduct of the Petitioner. This Court struck down the broadened application to the Petitioner as the Petitioner had no warning his actions were proscribed when committed. *Osborne* supra., S. Ct. at 1700, U.S. at 117, L. Ed. at 114.

In *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2nd. 260 (1977), this Court held that the Petitioners could not be held to standards of obscenity enunciated in a case handed down by this Court after his arrest. *Osborne* supra., S. Ct. at 118, U.S. at 1700, L. Ed. 2nd. at 114.

It is clear in the case at bar that the Petitioner's conviction was upheld by the Commonwealth Court of Pennsylvania using a broadened definition of nuisance in fact established in *Teal* supra. It is furthermore clear that the defendant's arrest postdated the broadened definition in *Teal* by nearly two months.

Therefore, in order for the Petitioner to be given the fair warning mandated by the Fourteenth Amendment, she could be held to no more than the standard enunciated in the Pennsylvania Supreme Court case of *Hanzlik* supra., which was significantly narrower than that of *Teal*.

The testimony in support of the nuisance, even taken in the light most favorable to the Respondent as verdict winner, was that there were no loud noises, offensive odors, rodents infesting the area, or any children who walked along the adjoining road or played in the area around the vehicles. Therefore, the evidence failed to establish the *Hanzlik* standard of offensive odors, attraction to vermin or the reasonable possibility of injury to a person and at best could be described as inconvenience or distraction, the *Teal* standard.

2. The definition of a nuisance in fact enunciated by the Commonwealth Court of Pennsylvania in Teal is so vague and subjective as to encourage arbitrary and erratic arrests and convictions and is, therefore, violative of the Fourteenth Amendment to the United States Constitution.

Even if this Honorable Court were to determine that Petitioner had sufficient knowledge of the type of conduct proscribed by the Penn Forest Township Ordinance as refined by the Commonwealth Court in *Teal* supra., Petitioner suggests that the *Teal* definition of nuisance in fact is so vague and subjective as to not pass due process scrutiny.

By their own terms, the words "public inconvenience and distraction" are subject to numerous interpretations. What is an "inconvenience" to one person may be a meaningless aspect of day-to-day living to another; what is a "distraction" to one person may not even be noticeable to others.

Allowing a definition so subjective to pass constitutional muster would be defining the law on a case-by-case basis, making elements of the crime so indefinite and uncertain that it could not be enforced as a penal offense. *Ashton v. Kentucky*, 384, U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2nd. 469.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a Writ of Certiorari should issue to review the decision of the Commonwealth Court of Pennsylvania in this case. If the Writ is issued, the Petitioner requests a reversal of Petitioner's conviction.

Respectfully submitted,

John DiBernardino, Esquire
Counsel of Record

APPENDIX

TABLE OF CONTENTS

	Page
A. Commonwealth Court Memorandum Opinion and Order	1a
B. Court of Common Pleas of Carbon County Memorandum Opinion and Order	1b
C. Penn Forest Township Ordinance 88-4 . . .	1c
D. Fourteenth Amendment to the United States Constitution, Section 1	1d

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAULINE SCHOCH,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

No. 884 C.D. 1991
SUBMITTED: September 12, 1991

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE CHARLES A. LORD, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE COLINS FILED: November 19, 1991

Pauline Schoch (Schoch) brings this appeal from an order of the Court of Common Pleas of Carbon County (common pleas court) upholding the Commonwealth and denying Schoch's post-verdict motions for a new trial and for arrest of judgment.

The following factual background gave rise to this appeal. In a proceeding before a district justice, Schoch was convicted of having violated Sections 6A and 6C(2) of Ordinance No. 88-4 (ordinance) of Penn Forest Township (township), Carbon. County, Pennsylvania.

The penalties (set forth in Section 8 of the ordinance) for violations include fines ranging from $100.00 to $300.00 and imprisonment of not less than ten (10) days or more than thirty (30) days. Schoch was fined $300.00, plus $80.00 in costs.

On appeal, after a hearing before the common pleas court, Schoch was again found guilty of having violated the foregoing sections of the ordinance. Schoch filed post-verdict motions for a new trial and for arrest of judgment, both of which were denied by the common pleas court in an order entered March 19, 1991, from which Schoch now appeals.

The ordinance provisions that Schoch was found to have violated provide, in pertinent part, as follows:

> SECTION 6A. - No junk shall be kept or stored on any premises or property within the Township unless the keeping and storage of the same is specifically permitted by the Zoning Ordinance.
>
> . . .
>
> SECTION 6C(2). - The owner or person in control of any private property shall at all times maintain the premises free from debris, garbage, junk and refuse.

Section 2 of the ordinance defines "junk" as "scrapped motor vehicles and vehicles which are inoperable, unlicensed, and do not have a current and valid inspection sticker." Schoch challenges the validity of the ordinance and her conviction thereunder, raising the following issues for our determination: (1) whether the common pleas court erred in finding that the Commonwealth met its burden of proving the scrapped vehicles on Schoch's property constituted a nuisance in fact; (2) whether the common pleas court erred in finding that the evidence submitted by the Commonwealth was sufficient to prove Schoch guilty beyond a reasonable doubt of violating the ordinance; (3) whether the common pleas court erred in finding that the ordinance prohibiting storage of junked vehicles was not void for

vagueness in failing to "unambiguously identify" what conduct is deemed a nuisance in fact; and (4) whether the common pleas court erred in finding that enforcing an ordinance prescribing criminal penalties against a property owner (who had engaged in the proscribed conduct before enactment of the ordinance) was not an unconstitutional retroactive application of a criminal statute.

The test for determining sufficiency of evidence to support a guilty verdict is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences in the Commonwealth's favor, the fact finder reasonably could have determined that all elements of the offense were established beyond a reasonable doubt. *Scott v. Commonwealth*, 134 Pa. Commonwealth Ct. 519, 578 A.2d 1022 (1990). Our review of the record indicates evidence supporting the common pleas court's decision in this regard.

Penn Forest, a township of the second class, derives its authority to prohibit nuisances, including the storage of junked automobiles and scrap, from Section 702 of The Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §65712. The Supreme Court, however, has held that although Section 702 gives a second class township the power to prohibit nuisances *in fact*, it did not give these townships authority to declare or define the storage of junked vehicles to be nuisances *per se*, but only the authority to prove them nuisances *in fact*. *Teal v. Township of Haverford*, 134 Pa. Commonwealth Ct. 157, 578 A.2d 80 (1990), *petition for allowance of appeal denied*, ____ Pa. ____, 593 A.2d 429 (1991).

In the present case, the common pleas court noted that "case law requires the Commonwealth to prove the prohibited condition to be a nuisance in fact in order to enforce this type of ordinance." As the ultimate trier of fact, the common pleas court found that the Commonwealth met this burden of proof.

During the trial, the Commonwealth's one witness, a township code enforcement officer, testified that scrapped motor vehicles, vehicle parts, rusted material and broken glass were kept on Schoch's property in an unfenced area easily visible and accessible to neighboring homes and to an adjacent public road. On cross-examination, the officer admitted that the aforementioned items were 50 feet from the road and had not yet interfered with traffic or pedestrians, were not infested by rats, and had not, thus far, attracted children, or actually injured anyone. In contrast, the only witness for Schoch was her son, who testified that the scrapped vehicles had been stored on his mother's property for a long time (perhaps even prior to the effective date of the ordinance) and that he used some of the scrap material to make belt buckles. Making a credibility determination as fact finder, the common pleas court found that the Commonwealth had succeeded in establishing beyond a reasonable doubt that Schoch had created a clearly visible, hazardous condition on her unfenced property,-i.e., rusted material, broken glass, in addition to the scrapped vehicles, although no injury had yet occurred.

After reviewing the record and this testimony "in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth," we conclude that the fact finder reasonably determined that all elements of the offense were established beyond a reasonable doubt, *Commonwealth v. Aulisio*, 514 Pa. 84, 91, 522 A.2d 1075, 1079 (1987), and that Schoch's storage of the junked vehicles did, in fact, constitute a nuisance.

We further agree with the common pleas court in finding Schoch's second argument to be without merit and in rejecting Schoch's contention that the ordinance is unconstitutionally void for vagueness in failing to unambiguously identify the prohibited conduct that would make storage of junked automobiles a nuisance in fact. In rebutting Schoch's argument,

the Commonwealth points out that not only does the ordinance define the term "junk" but also places specific responsibilities upon property owners to refrain from storing junk on their property "unless specifically permitted by the Zoning Ordinance" and to keep their property "free from debris, garbage, junk and refuse." Further, in refuting Schoch's argument as to the unconstitutionality of the ordinance, the Commonwealth cites a significant body of cases with similar fact patterns in which the validity of comparable ordinances was upheld. *See Commonwealth v. Sadecky*, 41 Pa. Commonwealth Ct. 86, 398 A.2d 1073 (1979); *Talley v. Borough of Trainer*, 38 Pa. Commonwealth Ct. 441, 394 A.2d 645 (1978).

The common pleas court rejected Schoch's "void for vagueness" argument on the basis that Sections 6A and 6C(2) of this ordinance (provided earlier in this opinion) clearly require premises to be kept free from debris and junk and Section 2 includes in its definition of "junk," motors, inoperable and unlicensed vehicles, and vehicles without a valid inspection certificate. After having examined the ordinance's language and weighing the respective arguments of Schoch and the Commonwealth, the common pleas court reasonably concluded that the ordinance is worded so unambiguously as to not foreseeably elicit misinterpretation or arbitrary enforcement.

We now turn to Schoch's argument that the common pleas court erred in ruling that enforcing the ordinance and its criminal penalties against a property owner (who had engaged in the prohibited activity before enactment of the ordinance) was not an unconstitutional retroactive application of the law. In support of this argument, Schoch's only witness was her son who attested to their 13-year practice of storing the junked vehicles. In response, the Commonwealth argues that Schoch was unable to present the common pleas court with any persuasive evidence to justify continuing an activity that had become a nuisance in fact and a hazard to the community's health, safety and welfare.

Finding the code enforcement officer's testimony to be more credible than that of Schoch's son, the common pleas court agreed with the Commonwealth and reasoned that Schoch's offense emanates from her *current* use of her property which creates a *current* threat to public health, safety and welfare, and that no "grandfather" legislation exists to allow her to continue such activities.

Our review of the record leads us to concur with the common pleas court that no prior storage of the junked vehicles, however long-standing, gave Schoch a vested right to continue creating "public danger, inconvenience, or distraction." *Teal* at 163, 578 A.2d at 83.

Accordingly, the decision of the common pleas court is affirmed.

/s/_____
JAMES GARDNER COLINS,
Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAULINE SCHOCH,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

No. 884 C.D. 1991

ORDER

AND NOW, this 19th day of November, 1991, the order of the Court of Common Pleas of Carbon County in the above-captioned matter is affirmed.

/s/_____
JAMES GARDNER COLINS,
Judge

Certified From The Record
Nov. 19, 1991

/s/_____
Deputy Prothonotary
Chief Clerk

IN THE COURT OF COMMON PLEAS
CARBON COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

PAULINE SCHOCH,

Defendant

NO 490 CR 1990

CRIMINAL DIVISION

MEMORANDUM OPINION

Pauline Schoch had been convicted before a District Justice of violation of Penn Forest Township (Carbon County, Pennsylvania) Ordinance 88-4, Sections 6A and 6C(2). An appeal was taken to this Court and after hearing the Defendant was found guilty and the appeal denied. The Defendant then filed post verdict motions for a New Trial and in Arrest of Judgment. Both parties submitted briefs and the matter is presently before the Court for disposition.

The subject Ordinance provides inter alia for the prohibiting and regulating nuisances generally, the keeping or storage of debris and junk, the abatement of prohibited conditions and penalties for violations. Section 6A provides "No junk shall be kept or stored on any premises or property within the Township unless the keeping and storage of the same is specifically permitted by the Zoning Ordinance." Section 6C(2) reads "The owner or person in control of any private property shall at all

times maintain the premises free from debris, garbage, junk and refuse." In Section 2 junk is defined in part as "scrapped motor vehicles and vehicles which are inoperable, unlicensed, and do not have a current and valid inspection sticker."

During the summary appeal trial, the Commonwealth called one witness, the Code Enforcement Officer for the Township and while her testimony was sparse she did say there were scrapped motor vehicles, vehicle parts, rusted materials and broken grass on the property and the area was not fenced. On cross examination she testified the nearest vehicle was about fifty feet from the adjacent road and it did not interfere with traffic or pedestrians; no rodents infested the area; she had no knowledge of children playing around the vehicles and know of no injuries occurring to anyone by reason of the conditions.

The one witness for the defense was Milford Schoch, the son of the Defendant, who testified the vehicles had been stored on his mother's property for a long period, perhaps pre-dating by at least thirteen years the effective date of the Ordinance. He stated he makes use of the scrapped materials by casting aluminum and making belt buckles, which, for the most part, has been a hobby and occasionally he has sold some buckles.

The defense has advanced several issues. First, it is argued the Ordinance is invalid because it does not necessitate proof that the complained-of activity constitutes a nuisance in fact.

The Commonwealth acknowledges that under the case law the Ordinance would be invalid if it merely declared the storage of junked or abandoned vehicles to be a nuisance per se. Because the Ordinance does not declare or define the accumulation of abandoned or junked vehicles a nuisance, a reasonable interpretation of the Ordinance does require the Township to prove a nuisance in fact exists. Thus the Commonwealth argues, and this Court agrees, adopting a reasonable interpretation saves the Constitutionality of the ordinance. Accordingly the contention of the defense, that the failure to define a nuisance necessitating

proof of a factual basis makes the Ordinance invalid or offends Constitutional principles, must fall. *See, Kadash v. City of Williamsport*, 19 Pa. Commw. 643, 340 A.2d 617 (1975).

However, it must be noted, before a person can be convicted pursuant to the terms of the Penn Forest Ordinance, the Commonwealth does have the burden of proving the storage of junked or abandoned vehicles is a nuisance in fact.

This first question presented leads to the second issue — whether the Ordinance in question is unconstitutional as violative of the Defendant's right to due process by its vagueness due to its failure to unambiguously identify the proscribed conduct which must exist for the storage of junked vehicles to be considered a nuisance in fact.

The void for vagueness doctrine is well known and the appellate decisions need not be reviewed. However, in this case, this doctrine is simply not applicable. Without reciting the various sections of the Ordinance again there can be no doubt that in the Township, premises must be maintained free from debris and junk. And "junk" includes motors, inoperable vehicles, unlicensed vehicles and those without a valid inspection certificate. The conduct being prohibited should be easy enough to understand and certainly does not encourage arbitrary and discriminatory enforcement which would not pass constitutional muster.

As stated earlier, the case law requires the Commonwealth to prove the prohibited condition to be a nuisance in fact in order to enforce this type of ordinance.

The third question then is whether or not the evidence here was sufficient to establish beyond a reasonable doubt (the ordinance prescribes criminal penalties) that a nuisance in fact existed. The defense contends the evidence was insufficient. It is pointed out there was not testimony of loud noises, offensive

odors, attraction to vermin, or the possibility of injury to any person — all standards of proof set forth in many cases.

On the other hand, the Commonwealth points out the Defendant has created a hazardous condition on her property even though no injury has as yet occurred. The condition is visible from homes located on either side of her property and the adjacent road is approximately fifty feet away — a comparatively short distance. In addition to the junked and abandoned vehicles which are scattered about the property, the premises are littered with broken glass and rusted materials. Further the said area is not surrounded by any fence and thus easily accessible.

In fairness to the defendant, it does seem to the trier of the facts that the situation in the present case is not as serious as the conditions existing in the several appellate holdings. Nevertheless, it cannot be said that the evidence given by the Codes Enforcement Officer does not establish beyond a reasonable doubt that Schoch has created a dangerous and hazardous condition upon her property. The Commonwealth pictures show not only an aesthetically umpleasing Schoch property but the obvious potential for injury. Surely the police power of the Township enables it to prohibit any activity concerning the health, safety and welfare of the community.

Finally, the Defendant claims the subject Ordinance is unenforceable against this Defendant who has been storing junked automobiles on her property for at least thirteen years prior to the effective date of the Ordinance. To charge the defendant in a criminal prosecution with a violation of conduct allowed prior to the enactment of the Ordinance, is said to be a retroactive application of a criminal offense.

The reasoning here must be faulty. The defendant is not being penalized for something she has done in the past. Nor can it be said that any actual business is conducted on the Schoch premises. The offense lies in the present use of the property which the Township has recognized involves current health,

safety and welfare concerns. There is no law which enables a party to obtain "grandfather" rights to continue such activities forever under such circumstances where a nuisance in fact exists.

In accord with this discussion we issue the following

COMMONWEALTH OF PENNSYLVANIA

vs.

PAULINE SCHOCH,

Defendant

IN THE COURT OF COMMON PLEAS
CARBON COUNTY, PENNSYLVANIA

NO 490 CR 1990

CRIMINAL DIVISION

ORDER

AND NOW, March 19, 1991, the Defendant's post verdict motions for a New Trial and an Arrest of Judgment are denied.

The conviction of the Defendant, Pauline Schoch, for violating Penn Forest Township Ordinance 88-4 is affirmed.

/s/_____
William W. Lipsitt, Senior Judge
Specially Presiding

ORDINANCE NO. 88 - 4

AN ORDINANCE OF THE TOWNSHIP OF PENN FOREST, CARBON COUNTY, PENNSYLVANIA PERTAINING TO THE MAINTENANCE OF PROPERTY IN THE TOWNSHIP OF PENN FOREST BY REQUIRING THE CUTTING AND REMOVAL OF GRASS, WEEDS AND NOXIOUS VEGETATION; BY PROHIBITING AND REGULATING NUISANCES GENERALLY, THE MAINTENANCE OF UNGUARDED OR ABANDONED EXCAVATION, WELLS, ETC., THE KEEPING OR STORAGE OF DEBRIS, GARBAGE, JUNK, AND REFUSE; AND PROVIDING FOR THE ABATEMENT OF PROHIBITED CONDITIONS AND PRESCRIBING PENALTIES FOR VIOLATIONS THEREOF.

It is hereby adopted and ordained by the Supervisors of Penn Forest Township, Carbon County, Pennsylvania as follows:

SECTION 1. Purpose

This chapter is adopted for the purpose of protecting the health, safety, general welfare and property of the inhabitants of the Township of Penn Forest.

SECTION 2. Definitions

The following words of phrase, when used in this chapter, shall have the meanings ascribed to them in this section, except when the context requires a different meaning:

ABANDONED EXCAVATION - One in which further construction has been permanently discontinued or where further construction has been permanently discontinued or where further construction has not been evident for a period of thirty (30) days or more.

DEBRIS - Dead trees, limbs or portions thereof which have become detached and have fallen to the ground, grass clippings, pruning or clippings from trees or shrubs, accumulations of leaves and other such combustible solid wastes.

GARBAGE - Putrescible animal and vegetable wastes resulting from the handling, preparation, cooking and consumption of food.

JUNK - as used in this Ordinance, shall mean discarded materials, articles or things and including but not limited to, scrap metal, paper, rags, glass, containers, scrap wood or lumber, trailers, broken or discarded furniture or household equipment, broken, neglected, abandoned or junked machinery and equipment, scrapped motor vehicles and parts thereof, including motors, bodies of motor vehicles and vehicles which are inoperable, unlicensed, and do not have a current and valid inspection sticker.

OPEN OR UNGUARDED WELL, CISTERN OR CESSPOOL - One which is not securely covered by a cover sufficient to withstand one thousand (1,000) pounds of pressure per each ten (10) square feet of cover area.

PERMANENT FENCE - One which is constructed pursuant to the provisions of the Building Code or Zoning Ordinance of the Township.

PERSON - Any individual, partnership, association, firm or corporation.

REFUSE - Putrescible and nonputrescible solid wastes, both combustible and noncombustible, including ashes, cartons, boxes, excelsior, rubber, leather, crockery, trash, rubbish and rubble and other such wastes which, when deposited as prohibited herein,

tend to create a danger to public health, safety or welfare or create unsightliness.

UNGUARDED EXCAVATION - One which is not completely enclosed by a fence at least six (6) feet in height.

SECTION 3. Nuisances Generally

Any person committing or maintaining a nuisance as defined in and prohibited by Chapter 65 of Title 18 of the Pennsylvania Consolidated Statutes shall be punishable as provided therein. Said Chapter 65 includes provisions pertaining to the scattering of rubbish, the discarding or abandonment of refrigerators and iceboxes with attached lids or doors, the posting of advertisements on property of another, the establishment or maintenance of public or common nuisances and the discarding or abandonment of television picture tubes or television sets containing unneutralized picture tubes.

SECTION 4. Cutting and Removal of Noxious Vegetation

A. It shall be unlawful for any person owning or occupying any property within the Township of Penn Forest to permit any grass or weeds or any vegetation whatsoever which is not edible or planted for some useful or ornamental purpose to grow or remain upon such premises so as to exceed a height of eight (8) inches, to throw off any unpleasant or noxious odor, to conceal any filthy deposit or to create or produce pollen. The cutting of such grass, weeds or other vegetation twice a month in the months of May, June, July, August and September and the removal of the grass, weeds or other vegetation so cut shall be deemed evidence that no violation of this Section shall have been created.

B. The owner of any vacant premises or premises occupied by the owner, and the occupant thereof in the case of premises occupied by other than the owner thereof, shall remove, trim or cut all grass, weeds or other vegetation growing

or remaining upon such premises in violation of any of the provision of this Section.

SECTION 5. Unguarded or Abandoned Wells and Excavations

A. Nuisance declared; abatement required. Any open or unguarded well, cistern, cesspool or abandoned excavation is hereby declared a public nuisance, except as hereinafter provided. Any such public nuisance shall be abated without further notice by the owner of the land of which such public nuisance exists.

B. Guarding of other excavations. All other excavations having accumulated surface or drainage water over a depth of one (1) foot shall have fences, commencing at ground level and extending six (6) feet in height, erected around such excavation at such times and hours that such excavation is not being worked on.

SECTION 6. Debris, Garbage, Junk and Refuse

A. Junk. No Junk shall be kept or stored on any premises or property within the Township unless the keeping or storage of the same is specifically permitted by the Zoning Ordinance.

B. Debris, garbage and refuse. No debris, garbage or refuse shall be stored or allowed to accumulate on any premises or property within the Township except in approved metal or plastic containers for collection, or in plastic bags, so long as the plastic bags are not placed outside more than twenty-four (24) hours before collection, or in areas specifically designated as approved disposal sites by the Township or other governmental agency having authority or control over such disposal.

C. Responsibility or property owners.

(1) Commercial property. Each owner or person in control of any commercial place, shall keep said place, parking fields, parking areas, delivery areas and

other open areas which are a part of such commercial place free from debris, garbage, junk and refuse.

(2) Private premises. The owner or person in control of any private property shall at all times maintain the premises free from debris, garbage, junk and refuse.

SECTION 7. Notice to Abate

Any owner, occupier or tenant of any private property on which any of the foregoing items or conditions shall exist shall, within five (5) days after receipt of notice from the Township to do so, repair, remove, correct or abate such condition. Each day during which any such condition is permitted to exist after said five-day notice period has expired shall constitute a separate offense under this chapter.

SECTION 8. Penalties.

Any person who shall violate any of the provisions of this Ordinance shall, upon conviction thereof, be sentenced to pay a fine of not less than One Hundred ($100.00) Dollars nor more than Three Hundred ($300.00) Dollars, and costs of prosecution, and in default of payment thereof to imprisonment for not less than ten (10) days nor more than thirty (30) days. PROVIDED: Each day's violation of any of the provisions of this Ordinance shall constitute a separate offense.

SECTION 9. Severability.

The provisions of this Ordinance are severable and if any clause, sentence, subsection, section, article or part thereof shall be adjudged by any court of competent jurisdiction or decision shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation and application to the clause, sentence, subsections, section, article or part thereof rendered. It is hereby declared to be intent of the Supervisors that this Ordinance would have been adopted if such illegal, invalid, or

unconstitutional clause, sentence, subsection, section, article or part thereof had not been included therein.

SECTION 10. Additional Remedies.

The Township Supervisor for the Township of Penn Forest may take any appropriate action at law or equity, civil or criminal, to enforce the provisions of this Ordinance, and this Ordinance shall in no way restrict any remedies otherwise provided by law.

SECTION 11. Effective Date.

This Ordinance shall become effective ten (10) days after the date of its adoption by the Supervisors.

DULY ENACTED AND ORDAINED, by the Supervisors of the Township of Penn Forest, Carbon County, Pennsylvania, this 5th day of December 1988.

TOWNSHIP OF PENN FOREST

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1

Citizens of the United States

All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.